

CITY COUNCIL REPORT



Meeting Date: January 27, 2014
Charter Provision: *Provide for the orderly government and administration of the affairs of the City*
Objective: *Fiscal Management*

ACTION

Settlement of Kunzelman v. City of Scottsdale. Adopt Resolution No. 9635 authorizing the Mayor to execute Contact No. 2014-015-COS to settle the lawsuit titled *Kunzelman V. City Of Scottsdale*, currently pending in the Court of Appeals, State of Arizona, Division One, Case No. 1 CA-SA-13-0198.

BACKGROUND

The Plaintiffs filed this legal action against the City challenging the legality of the City's Environmentally Sensitive Lands Ordinance (ESLO) and alleging that the City was effecting an unconstitutional "taking" of their property. The Plaintiffs in this matter are the Kunzelmans who own property in the City of Scottsdale at the corner of Lone Mountain and 68th St. In 2008, the City filed code enforcement actions against the Kunzelmans in Scottsdale Municipal Court, regarding certain changes the Kunzelmans made to their Property, which included construction of an earthen "berm" along certain portions of the perimeter of their Property. The Kunzelmans disputed the violations and brought an action in the Maricopa County Superior Court, Cause No. CV 2009-025913, against the City seeking declaratory relief, injunctive relief, and damages. The litigation has been ongoing since 2009. The City was able to obtain favorable legal rulings in Federal District Court as well as the Superior Court. The Superior Court ruling is currently being challenged by the Kunzelmans in the Court of Appeals. The terms of the settlement are set forth in the attached settlement agreement. In general, the Kunzelmans have agreed to dedicate Natural Area Open Space ("NAOS") on their parcels and dismiss their claims in return for the City's agreement that the conditions prior to the execution of the settlement are vested and grandfathered. The City will retain its rights of code enforcement going forward. There is no monetary settlement, so the City treasury is not impacted.

ANALYSIS & ASSESSMENT

Recent Staff Action

The City Attorney's Office has been defending this matter. City Staff and the City Attorney's Office concur that it is in the best interest of the City to resolve the lawsuit at this time.

Policy Implications

None.

Significant Issues to be Addressed

If this case were to proceed, the Kunzelmans would continue their challenge to the legality of the City's ESLO and NAOS requirements. If they ultimately prevailed, a ruling could potentially impact major portions of the City. Additionally, the Kunzelmans would be entitled to reimbursement of their costs incurred in this litigation in addition to any damages recovered. Settlement of the pending action is well supported by the City's potential cost to litigate this case, including payments to its expert witnesses, and the potential adversity to the City of legal rulings should the Kunzelmans prevail.

Community Involvement

This case is in litigation, which does not involve a community outreach process.

RESOURCE IMPACTS

Available funding

No city funds will be paid in settlement of this matter.

Staffing, Workload Impact

The City Attorney's Office has been defending this case with the assistance of Risk Management and other City departments as needed. The proposed settlement will bring the case to a conclusion, lower the workload on each department, and cut off additional costs and attorneys fees necessary to defend the case.

Maintenance Requirements

None.

Future Budget Implications

None.

Cost Recovery Options

None.

OPTIONS & STAFF RECOMMENDATION

Recommended Approach

Approve Resolution No. 9635 and authorize settlement and release of this litigation, as proposed.

11924522v1

Description of Option B

Reject proposed settlement and release and proceed with litigation.

Description of Option C

N/A

Proposed Next Steps

If the settlement is approved the Mayor will execute the settlement agreement and the City Attorney's Office will prepare the final paperwork to conclude this matter.

RESPONSIBLE DEPARTMENT(S)

General Government, City Attorney's Office – Civil Division

Human Resources, Risk Management

STAFF CONTACTS (S)

Bruce Washburn

City Attorney, bwashburn@scottsdaleaz.gov:

Katie Callaway

Director, Risk Management, kcallaway@scottsdaleaz.gov

APPROVED BY


Bruce Washburn

By: Eric Anderson

Senior Assistant City Attorney

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ecanderson@scottsdaleaz.gov

1/10/14
Date


Don Hadder

Principal Planner

(480) 312-2352

dhadder@scottsdaleaz.gov

1/10/14
Date

ATTACHMENTS

1. Resolution No. 9635
2. Contract No. 2014-015-COS

11924522v1

RESOLUTION NO. 9635

A RESOLUTION OF THE COUNCIL OF THE CITY OF SCOTTSDALE, MARICOPA COUNTY, ARIZONA, AUTHORIZING THE SETTLEMENT OF *KUNZELMAN V. CITY OF SCOTTSDALE*, CURRENTLY PENDING IN THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE, CASE NO. 1 CA-SA-13-0198, AND AUTHORIZING THE MAYOR TO EXECUTE CONTRACT NO. 2014-015-COS.

WHEREAS, the City has determined that it is in its best interest to enter into a settlement with the Plaintiffs in *KUNZELMAN V. CITY OF SCOTTSDALE*.

NOW, THEREFORE, BE IT RESOLVED by the City of Scottsdale, Maricopa County, Arizona, as follows:

Section 1. The Mayor is authorized and directed to execute Contract No. 2014-015-COS on behalf of the City for the settlement of *KUNZELMAN V. CITY OF SCOTTSDALE*, currently pending in the Court of Appeals, State of Arizona, Division One, Case No. 1 CA-SA-13-0198.

Section 2. That the City Manager, the City Treasurer, the City Attorney, and their respective staffs, are authorized and directed to execute such documents and take such other actions as are necessary to carry out the purpose of this Resolution.

PASSED AND ADOPTED by the Council of the City of Scottsdale this ____ day of January, 2014.

ATTEST:

CITY OF SCOTTSDALE, an Arizona
municipal corporation

By: _____
Carolyn Jagger, City Clerk

By: _____
W. J. "Jim" Lane, Mayor

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY

By: _____
Bruce Washburn, City Attorney
By: Eric Anderson, Sr. Assistant City Attorney II

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS (hereafter referred to as the "Release") is entered into effective the date it is fully executed by and between the City of Scottsdale ("SCOTTSDALE"), a municipal corporation, and Christopher and Lori Kunzelman (collectively as "KUNZELMANS").

RECITALS

The purpose of this Release is to settle and dispose of forever all disputes, relationships, and agreements between SCOTTSDALE and THE KUNZELMANS (the "Parties").

A. THE KUNZELMANS own property in the City of Scottsdale, Assessor Parcel Numbers 216-67-170, 216-67-012A, 216-67-185A, and 216-67-171A ("Property").

B. In 2008, SCOTTSDALE filed zoning enforcement actions against THE KUNZELMANS in Scottsdale Municipal Court, Nos. M-0751-SC-2008028131 and M-0751-SC-2008028133, regarding certain changes made to the Property ("Municipal Court Litigation"), including construction of an earthen "berm" along certain portions of the perimeter of the Property depicted as cross-hatched areas on Assessor Parcel Numbers 216-67-170 and 216-67-012A on the Site Plan attached as Exhibit 1 ("Berm"). In the Municipal Court Litigation, SCOTTSDALE alleged that THE KUNZELMANS violated provisions of the Scottsdale Zoning Ordinance, including but not limited to disturbance of Natural Area Open Space ("NAOS").

C. A dispute arose between the Parties regarding the alleged zoning violations, SCOTTSDALE's NAOS regulations and other matters, and on August 12, 2009, THE KUNZELMANS brought an action in the Maricopa County Superior Court, Cause No. CV 2009-025913, against SCOTTSDALE seeking declaratory relief, injunctive relief, and damages ("Superior Court Litigation"). The Municipal Court Litigation and Superior Court Litigation will be referred to collectively as the "Litigation."

D. SCOTTSDALE and THE KUNZELMANS subsequently agreed to dismiss the Municipal Court Action without prejudice, subject to a tolling agreement.

E. The Superior Court subsequently entered an order in favor of SCOTTSDALE in the Superior Court Litigation, which dismissed the claims of THE KUNZELMANS.

F. THE KUNZELMANS filed an appeal of the Superior Court order and judgment, which was dismissed, and thereafter a Special Action, *Kunzelman v. City of Scottsdale*, Court of Appeals, State of Arizona, Division One, No. 1 CA-SA 13-0198, which is pending.

G. The Parties to this Release wish to compromise, resolve, and settle forever the claims made by SCOTTSDALE and THE KUNZELMANS in the Municipal Court Litigation and Superior Court Litigation, or any claims asserted, or which could have been asserted, by the Parties in the Municipal Court Litigation or Superior Court Litigation, except those specifically excepted herein. THE KUNZELMANS are entering into this Release solely to compromise disputed claims, and by executing this Release do not admit that the NAOS regulations are legal or constitutional.

AGREEMENT

IN CONSIDERATION OF the respective recitals, covenants, and conditions by and between the Parties contained herein, the Parties to this Release do hereby agree as follows:

1. General Mutual Release and Discharge. The Parties grant releases to each other as follows:

1.1 Upon dedication of NAOS as provided in Paragraph 1.3, THE KUNZELMANS hereby release and forever discharge SCOTTSDALE, its agents, servants, employees, attorneys and all other affiliated persons, firms and corporations, and its insurance carriers, from any and all claims, demands, obligations or causes of action of any nature whatsoever, whether based on a tort, contract, statutory, administrative or other legal theory of recovery, and whether for compensatory, punitive (or exemplary), statutory, equitable, or any other form of damages or legal relief, whether presently known or unknown, liquidated or unliquidated, contingent or non-contingent, which THE KUNZELMANS may have or which may hereafter discover related to or arising out of the claims that were raised in or that could have been raised in, or which arise out of, are based on, or pertain to the Litigation or the events giving rise thereto. This release does not apply to continuing rights and obligations of the Parties under this Release, and in the event a future court declares the NAOS dedication requirement illegal or unconstitutional, THE KUNZELMANS reserve the right to seek to void the dedication.

1.2 Upon dedication of NAOS as provided in Paragraph 1.3, SCOTTSDALE hereby releases and forever discharges THE KUNZELMANS, their

heirs, successors, assigns, purchasers, agents, employees, attorneys, insurance carrier and all affiliated persons, firms and corporations, from any and all claims, demands, obligations or causes of action of any nature whatsoever, whether based on a tort, contract, statutory, administrative or other legal theory of recovery, and whether for compensatory, punitive (or exemplary), statutory, equitable, enforcement, or any other form of damages or legal relief, whether presently known or unknown, liquidated or unliquidated, contingent or non-contingent, which SCOTTSDALE may have or which may hereafter discover related to or arising out of the claims that were raised in or that could have been raised in, which arise out of, are based on, or pertain to the Litigation or the events giving rise thereto. This release does not apply to continuing rights and obligations of the Parties under this Release.

1.3 Dedication of NAOS. Within 90 days from execution of this Release, THE KUNZELMANS will dedicate NAOS to SCOTTSDALE, as depicted on the attached Site Plan, in full satisfaction of all SCOTTSDALE requirements to designate and dedicate NAOS for the Property, which SCOTTSDALE will accept administratively. The NAOS dedication for the four parcels of the Property may be submitted as a single map of dedication. With the dedication, THE KUNZELMANS will include legal descriptions for each parcel, the NAOS dedication, and any applicable General Land Office ("GLO") easements that exist on THE KUNZELMANS' parcels. SCOTTSDALE will review the legal descriptions of the NAOS dedication to confirm that they generally correspond to the attached Site Plan and, if so, will accept the legal descriptions. The maps of dedication will indicate the total square footage of NAOS for each of the four parcels. SCOTTSDALE will allow transferability of NAOS credit between the four

parcels owned by THE KUNZELMANS that make up the Property. The Berm may remain in place in the condition it exists as of the date of this Release, and THE KUNZELMANS will not perform any further construction, repair, remediation, or improvement work in any area dedicated as NAOS without first obtaining permission from SCOTTSDALE. SCOTTSDALE will advise the Kunzelmans in writing or through electronic mail within ten (10) days of contact if a permit is necessary for the proposed work. If so, THE KUNZELMANS will follow the necessary procedures to obtain required permits prior to performing any work within NAOS. All zoning setbacks will be measured from the property lines of the Property rather than from the boundary lines of the GLO easements.

1.4 The Parties acknowledge that the photograph(s) attached as Exhibit 2 represent the condition of the Property as of the date of this Agreement.

2. Attorneys' Fees, Court Costs, and Litigation Expenses. The Parties acknowledge and agree that they hereby waive, give up, and forego, and will refrain from enforcing, any claims against each other for the recovery of attorneys' fees, court costs, and expenses incurred in the Litigation.

3. Dismissal of Litigation. Within five (5) days of full execution of this Release, the Parties shall execute a stipulation for dismissal of the special action pending in the Court of Appeals, which will provide that the Parties will each bear their own costs, expenses, and attorneys' fees. SCOTTSDALE will not re-file any of the citations that were previously dismissed without prejudice in the Municipal Court Action and will not file any new citations arising out of the condition of the Property or Berm as of or prior to the date of this Release, and SCOTTSDALE hereby releases the tolling agreement

between the Parties in the Municipal Court Action. Notwithstanding the above, SCOTTSDALE will retain Code enforcement rights on a going-forward basis for any violations of this Release or other City Code matters arising after the effective date of this Release.

4. Warranties and Representations by SCOTTSDALE. As part of the consideration for this Release, SCOTTSDALE expressly warrants and represents that:

4.1. The appropriate and necessary persons have executed this Release; the individual executing this Release has authority to execute this Release; and the necessary steps have been taken to give the individual executing this Release the authority to do so.

4.2. It has not assigned, pledged or otherwise in any manner whatsoever, sold or transferred either by instrument, in writing or otherwise any rights, title, interest or claim that it has or may have against THE KUNZELMANS arising in any way from the matters described in this Release.

5. Warranties and Representations by THE KUNZELMANS. As part of the consideration given for this Release, THE KUNZELMANS expressly warrant and represent that they have not assigned, pledged or otherwise in any manner whatsoever, sold or transferred either by instrument, in writing or otherwise any rights, title, interest or claim that they have or may have against SCOTTSDALE arising in any way from the matters described in this Release.

6. No Admission of Liability from this Settlement. This is a compromise settlement of disputed claims. The consideration for this Release shall not be deemed or construed as an admission of liability on the part of any Party.

7. Full and Complete Settlement. The consideration given by the Parties as described herein is for a full and complete settlement and release by the Parties against each other which arise out of, are based on, or pertain to the Litigation, subject to the provisions of Paragraph 2.

8. Representations and Warranties. Except as expressly stated in this Release, none of the Parties have made any statement or representation to any other party regarding any fact which is relied upon by any other party entering into this Release. The Parties represent and declare that in executing this Release, they relied solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, considering their rights and claims hereunder, and any and all matters which relate in any way to the subject matter hereof, including their decision to enter into this Release.

9. Interpretation. The terms of this Release were reached between each Party through their attorneys-of-record. Because the Parties hereto have each reviewed the terms of this Release and have relied on the advice of their respective attorneys as to the terms and provisions, the usual rule that the provisions of a document are to be construed and interpreted against the drafter does not apply to the interpretation of the provisions herein. This Release is entered into in the State of Arizona and is to be interpreted in accordance with its laws. The Parties agree to subject themselves to the jurisdiction of Arizona courts for any litigation arising from this Release.

10. Successors, Assigns, and Beneficiaries. This Release and all of its terms shall inure to the benefit of and shall bind the successors, assignees, heirs,

representatives, beneficiaries, shareholders, members, and attorneys of the Parties, and each of them.

11. Severability. To the extent any portion of this Release shall be judicially determined to be invalid or unenforceable, the same shall, to that extent, be deemed severable from this Release and the invalidity or unenforceability thereof shall not affect the validity and enforceability of the remaining portion of this Release.

12. Entire Agreement. This Release contains the entire agreement between the Parties relating to the transactions contemplated hereby and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged and fully integrated into this Release.

13. Amendment. No modification, waiver, or discharge of this Release will be valid unless it is in writing and signed by the Party against whom the enforcement of the modifications, waiver, or discharge is or may be sought.

14. Headings. The descriptive headings of the several articles and paragraphs contained in this Release are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

15. Survival. All representations and agreements set forth herein shall be deemed continuing and shall survive the effective date of the Release.

16. Cooperation of the Parties. The Parties agree to execute such other documents and to take such other actions as may reasonably be necessary to further the purpose of this Release.

17. Counterparts. This Release may be executed in counterparts with the same force and effect as if all signatures were set forth in a single document.

IN WITNESS WHEREOF, this _____ day of _____, 2014.

Christopher Kunzelman

Lori Kunzelman

APPROVED AS TO FORM:

Gallagher & Kennedy. P.A.

By: _____
Jeffrey D. Gross, Attorney

CITY OF SCOTTSDALE

CITY OF SCOTTSDALE,
an Arizona municipal corporation

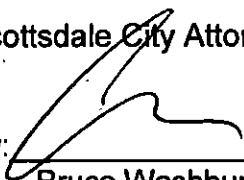
ATTEST:

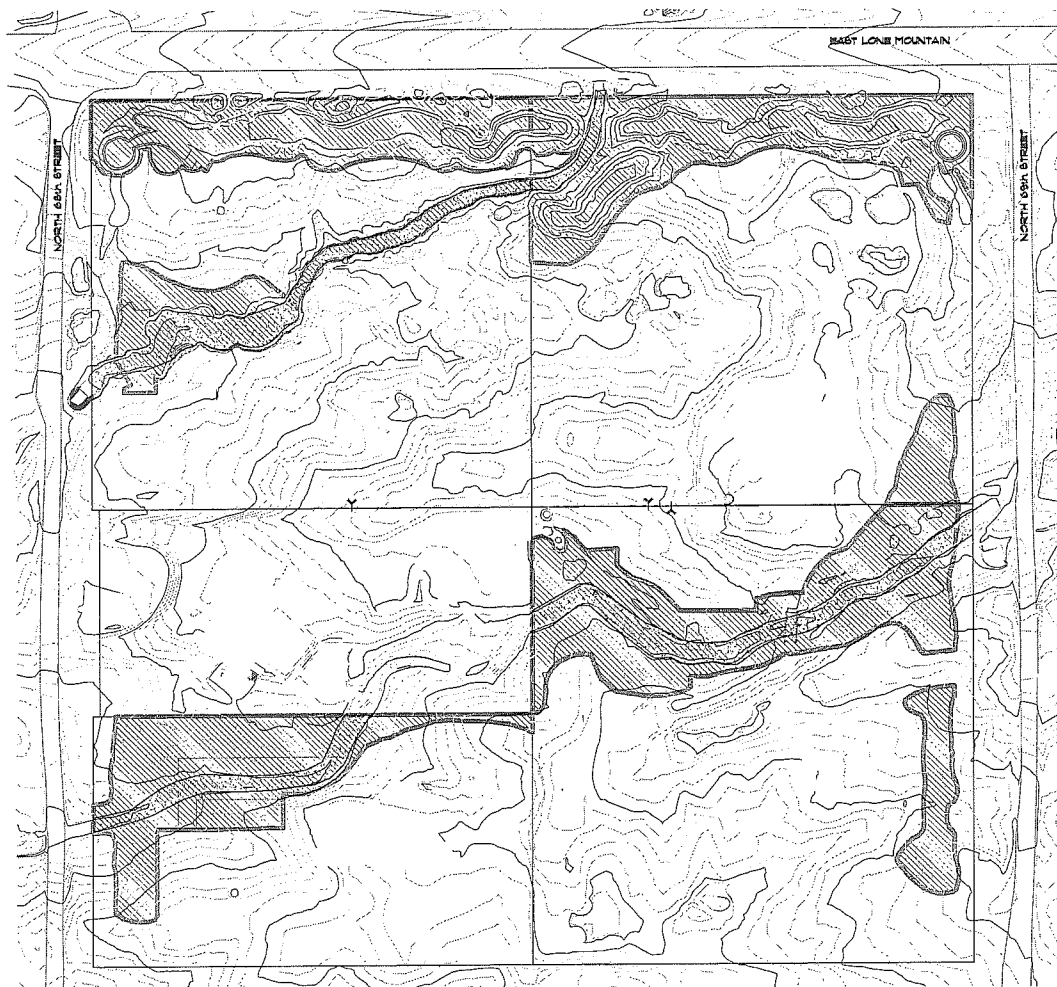
By: _____
W.J. "Jim" Lane, Mayor

Carolyn Jagger, City Clerk

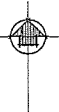
APPROVED AS TO FORM:

Scottsdale City Attorney's Office

By:  _____
Bruce Washburn, City Attorney
by Eric Anderson, Assistant City Attorney



PRELIMINARY
SKETCH SITE PLAN
SCALE: 1" = 40'-0"



CONCEPT NAOB AREAS					
USE DESCRIPTION	PARCEL DATA				TOTALS
	20-01-010	20-01-011	20-01-012	20-01-013	
GROSS LAND AREA (GLA)	120,000 s.f.	120,000 s.f.	120,000 s.f.	120,000 s.f.	480,000 s.f.
RIGHT OF WAY	15,000 s.f.	15,000 s.f.	15,000 s.f.	15,000 s.f.	60,000 s.f.
NET LOT AREA (NLA)	105,000 s.f.	105,000 s.f.	105,000 s.f.	105,000 s.f.	420,000 s.f.
NAOB AREA REQUIRED * 35%	36,750 s.f.	36,750 s.f.	36,750 s.f.	36,750 s.f.	147,000 s.f.
NAOB AREA PROVIDED (%)	33.33%	33.33%	33.33%	33.33%	33.33%
NAOB AREA PROVIDED (%)	33.33%	33.33%	33.33%	33.33%	33.33%

Exhibit 1 2014-015-COS Page 1 of 1

JOB NO. 2014-015		CREATED BY: SAJ
APPROVED BY: SAJ		DATE: 12/15/2014
SCALE: 1" = 40'-0"		
REVISIONS DATE DESIGNED BY DATE UPDATED BY		
PRELIMINARY SKETCH SITE PLAN		
SAJ: J. J. J. ARCHITECT ARCHITECTS AND PLANNERS 1001 EAST LONE MOUNTAIN ROAD PHOENIX, ARIZONA 85014		
NEW HOME FOR MR. & MRS. CHRISTOPHER KINZELMAN 6815 EAST LONE MOUNTAIN ROAD SCOTTSDALE, ARIZONA		
SHEET 12/15/2014 NAOB		

